

AMENDED IN SENATE APRIL 14, 2005

AMENDED IN SENATE APRIL 7, 2005

SENATE BILL

No. 390

Introduced by Senator Bowen

February 17, 2005

An act to ~~amend Section 11604 of~~ *add Section 11604.5 to* the Probate Code, relating to probate ~~agreements~~ *assignments*.

LEGISLATIVE COUNSEL'S DIGEST

SB 390, as amended, Bowen. Probate assignments: cash advances.

Existing law provides for the regulation of the distribution of an estate.

This bill would similarly regulate the assignment of a beneficiary's entire or partial interest in an estate in consideration for a cash advance *or any other consideration*, as specified. The bill would require the agreement to be filed with the court, would require specified disclosures with regard to costs and fees, and would prohibit an assignment agreement from containing certain provisions, including, but not limited to, ~~an acceleration or a~~ binding arbitration clause. *The bill would further authorize the court to modify or refuse to order that assignment under specified circumstances, and would allow for specified damages upon a willful violation of the above-described provisions.*

~~Because a violation of those provisions would be a misdemeanor, this bill would impose a state-mandated local program by expanding the scope of a crime.~~

~~The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.~~

~~This bill would provide that no reimbursement is required by this act for a specified reason.~~

Vote: majority. Appropriation: no. Fiscal committee: ~~yes~~-no.
State-mandated local program: ~~yes~~-no.

The people of the State of California do enact as follows:

1 ~~SECTION 1. Section 11604 of the Probate Code is amended~~
2 ~~to read:~~

3 ~~SECTION 1. Section 11604.5 is added to the Probate Code,~~
4 ~~to read:~~

5 ~~11604.5. (a) This section applies when distribution from an~~
6 ~~estate is made to a transferee for value who acquires any interest~~
7 ~~of a beneficiary in exchange for cash or other consideration.~~

8 ~~(b) For purposes of this section, a transferee for value is a~~
9 ~~person who satisfies both of the following criteria:~~

10 ~~(1) He or she purchases the interest from a beneficiary for~~
11 ~~consideration pursuant to a written agreement.~~

12 ~~(2) He or she is directly or indirectly regularly engages in the~~
13 ~~purchase of beneficial interests in estates by cash or other~~
14 ~~consideration.~~

15 ~~(c) This section does not apply to either of the following~~
16 ~~transferees:~~

17 ~~(1) A transferee who is a beneficiary of the estate or a person~~
18 ~~who has a claim to distribution from the estate under another~~
19 ~~instrument or by intestate succession.~~

20 ~~(2) A transferee who is either the registered domestic partner~~
21 ~~of the beneficiary, or is related by blood, marriage, or adoption~~
22 ~~to the beneficiary or the decedent.~~

23 ~~(d) A written agreement is effective only if all of the following~~
24 ~~conditions are met:~~

25 ~~(1) The written agreement executed by the beneficiary is filed~~
26 ~~with the court and served on the personal representative not later~~
27 ~~than 30 days following the date of its execution.~~

28 ~~(2) The written agreement signed by the beneficiary is~~
29 ~~personally delivered to the beneficiary in English, together with~~
30 ~~a copy in the same language principally used in any discussion~~
31 ~~or negotiation leading to the execution of the written agreement~~
32 ~~if other than English.~~

1 (3) *The documents signed by, or provided to, the beneficiary*
2 *are printed in at least 10-point type.*

3 (4) *The transferee for value executes a declaration or affidavit*
4 *attesting that the requirements of this section have been satisfied,*
5 *and that declaration or affidavit is filed with the court within 30*
6 *days of the beneficiary executing the written agreement.*

7 (5) *The declaration or affidavit, and any other document*
8 *signed by the beneficiary in addition to the written agreement, is*
9 *served on the personal representative concurrently with filing the*
10 *declaration or affidavit with the court.*

11 (e) *The written agreement shall include the following terms, in*
12 *addition to any other terms:*

13 (1) *The amount of consideration paid to the beneficiary.*

14 (2) *A description of the transferred interest, together with a*
15 *good faith estimate of the value of the anticipated distribution.*

16 (3) *If the written agreement so provides, the amount by which*
17 *the transferee for value would have its distribution reduced if the*
18 *beneficial interest assigned is distributed prior to a specified*
19 *date.*

20 (4) *The total of all costs or fees charged to the beneficiary*
21 *resulting from the transfer for value, including, but not limited to,*
22 *transaction or processing fees, credit report costs, title search*
23 *costs, due diligence fees, filing fees, bank or electronic transfer*
24 *costs, or any other fees or costs.*

25 (f) *A written agreement shall be voidable if it contains any of*
26 *the following provisions:*

27 (1) *A provision holding harmless the transferee for value.*

28 (2) *A provision requiring binding arbitration.*

29 (3) *A provision granting to the transferee for value agency*
30 *powers to represent the beneficiary's interest in the decedent's*
31 *estate beyond the interest transferred.*

32 (4) *A provision requiring payment by the beneficiary to the*
33 *transferee for value for compensation for services relating to*
34 *matters beyond the beneficial interest transferred.*

35 (5) *A provision permitting the transferee for value recourse*
36 *against the beneficiary if the distribution from the estate in*
37 *satisfaction of the beneficial interest has a value less than the*
38 *consideration paid by the transferee for value.*

39 (g) *The court on its own motion, or on the motion of the*
40 *personal representative or other interested person, may inquire*

1 into the circumstances surrounding the execution of, and the
2 consideration for, the written agreement to determine that the
3 requirements of this section have been satisfied.

4 (h) The court may refuse to order distribution under the
5 written agreement, or may order distribution on any terms that
6 the court considers equitable, if the court finds that any of the
7 following conditions existed at the time of transfer:

8 (1) The fees, charges, or consideration paid or agreed to be
9 paid by the beneficiary were grossly unreasonable.

10 (2) The transfer of the beneficial interest was obtained by
11 duress, fraud, or undue influence.

12 (i) The court may refuse to order distribution under the written
13 agreement, or may order distribution on any terms that the court
14 considers equitable, if the court finds that the transferee for value
15 did not substantially comply with the requirements of this
16 section.

17 (j) In addition to any remedy specified in this section, the court
18 may require transferee for value to pay to the beneficiary up to
19 twice the amount of the assignment as the court considers
20 appropriate for any willful violation of the requirements of this
21 section.

22 (k) Notice of the hearing on any motion brought under this
23 section shall be served on the beneficiary and on the transferee
24 for value at least 15 days before the hearing in the manner
25 provided in Section 415.10 or 415.30 of the Code of Civil
26 Procedure.

27 ~~11604. (a) This section applies where distribution is to be~~
28 ~~made to any of the following persons:~~

29 ~~(1) The transferee or assignee of a beneficiary.~~

30 ~~(2) Any person other than a beneficiary under an agreement,~~
31 ~~request, or instructions of a beneficiary or the attorney-in-fact of~~
32 ~~a beneficiary.~~

33 ~~(b) (1) A beneficiary's entire or partial interest in the estate~~
34 ~~may be assigned by written agreement in consideration for a cash~~
35 ~~advance, only if the following conditions are met:~~

36 ~~(A) The complete assignment agreement is filed with the~~
37 ~~court.~~

38 ~~(B) The complete assignment agreement is provided to the~~
39 ~~personal representative or the personal representative's attorney~~
40 ~~of record.~~

1 ~~(C) The stated consideration was, in fact, provided to the~~
2 ~~beneficiary.~~

3 ~~(D) The assignment is nonrecourse to the beneficiary in the~~
4 ~~event that there are not sufficient assets from the beneficiary's~~
5 ~~interest in the estate to cover the full value of the assignment.~~

6 ~~(2) In addition to paragraph (1), in consideration of a cash~~
7 ~~advance the following items shall be disclosed, with reasonable~~
8 ~~certainty, to the beneficiary at the time the assignment was~~
9 ~~executed:~~

10 ~~(A) The amount of the consideration to be paid to the~~
11 ~~beneficiary.~~

12 ~~(B) The amount of the assignment.~~

13 ~~(C) If applicable, any reduction in the amount of the~~
14 ~~assignment, if the estate distributes within a stated early payoff~~
15 ~~rebate timeframe.~~

16 ~~(D) The amount of any costs or fees to be charged to the~~
17 ~~beneficiary, such as transaction or processing fees, document~~
18 ~~retrieval costs, credit report costs, title search costs, due diligence~~
19 ~~fees, filing fees, bank or electronic transfer costs, or any other~~
20 ~~fees or costs to be charged to the beneficiary.~~

21 ~~(3) Other than those charges referred to in subparagraph (C) of~~
22 ~~paragraph (2), no additional charges, such as interest, fees, or~~
23 ~~costs, shall be added to the amount of the assignment.~~

24 ~~(4) The assignment shall be written and available in the same~~
25 ~~language principally used in any oral discussion or negotiation~~
26 ~~leading to execution of the agreement and shall be in at least~~
27 ~~10-point type.~~

28 ~~(5) Under no circumstance shall an assignment agreement~~
29 ~~include any of the following:~~

30 ~~(A) A hold harmless clause.~~

31 ~~(B) A confession of judgment clause.~~

32 ~~(C) A power of attorney conferring general powers to the~~
33 ~~assignee to represent the beneficiary's entire interest in the~~
34 ~~decedent's estate.~~

35 ~~(D) Any assignment or other compensation for services,~~
36 ~~except for the portion of the estate to be assigned under the~~
37 ~~agreement.~~

38 ~~(E) Any acceleration provision.~~

39 ~~(F) A binding arbitration clause.~~

~~(e) The court on its own motion, or on motion of the personal representative or other interested person or of the public administrator, may inquire into the circumstances surrounding the execution of, and the consideration for, the transfer, agreement, request, or instructions, and the amount of any fees, charges, or consideration paid or agreed to be paid by the beneficiary.~~

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~~(d) The court may refuse to order distribution, or may order distribution on any terms that the court deems just and equitable, if the court finds either of the following:~~

~~(1) The fees, charges, or consideration paid or agreed to be paid by a beneficiary are grossly unreasonable.~~

~~(2) The transfer, agreement, request, or instructions were obtained by duress, fraud, or undue influence.~~

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~~(e) Notice of the hearing on the motion shall be served on the beneficiary and on the persons described in subdivision (a) at least 15 days before the hearing in the manner provided in Section 415.10 or 415.30 of the Code of Civil Procedure.~~

~~(f) A violation of any condition set forth in subdivision (b) is a misdemeanor.~~

~~SEC. 2. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.~~